In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 727

LLOYD BRAXTON BURGESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A–3A; R. III, 6–8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1968 (R. III, 10). The petition for a writ of certiorari was filed on November 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether officers had sufficient probable cause to stop petitioner's automobile and search it, without a warrant, for contraband whiskey.

327-258—68

STATEMENT

After a nonjury trial in the United States District Court for the Middle District of North Carolina petitioner was found guilty on two counts of an indictment charging removal and concealment of six and one-eighth gallons of non-taxpaid whiskey in violation of 26 U.S.C. 5601(a)(12), and possession and transportation of this whiskey in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1) (R. I, 7; R. II, 5–6, 70).[1] On March 26, 1968, petitioner was sentenced to imprisonment for six months on Count 1; imposition of sentence on Count 2 was suspended and he was placed on probation for five years, to commence upon expiration of the sentence on Count 1 (R. I, 12, 13). The court of appeals affirmed (R. III, 6–10).

On December 7, 1967, between 2:00 and 3:00 p.m., North Carolina A.B.C. Officer Collins, in the presence of Officer Turner, received information from a confidential informant that petitioner would leave his home about "first dark" that night and that he would be transporting non-taxpaid whiskey into the Durham area in a blue 1956 Dodge, North Carolina license number EX 4397 (R. II, 13–15, 33, 38).[2] Collins had previously received from this informant reliable information which had led to convictions for liquor law violations (R. II, 13–14, 31–32). Both Collins and Turner had knowledge of petitioner's reputation as a

[1] The court found codefendant Lewis, also charged in both counts of the indictment, not guilty (R. II, 60–61).

[2] The evidence as to guilt and a motion to suppress, was heard at the same time by agreement of the parties (R. II, 11–22).

wholesaler and manufacturer of non-taxpaid whiskey (R. II, 15, 35–36, 71–72).

At about 5:30 p.m., Officer Collins and federal agent Devaney of the Treasury's Alcohol and Tobacco Tax Division, equipped with power binoculars, took a surveillance position about 200 yards southwest of petitioner's house (R. II, 15–17, 33). Officers Turner and Smith and federal agent Carter, who were parked in a government automobile about one mile from petitioner's residence, were in radio contact with the surveilling officers (R. II, 15–16, 33–34).

At about 6:00 p.m., Collins saw petitioner and another man drive a pickup truck into petitioner's back yard. The two men entered the house where they remained about 10 or 15 minutes (R. II, 17–18). When petitioner and the other man came out, the man took a pasteboard carton out of the back of the truck and walked toward the 1956 blue Dodge parked in the back of petitioner's premises. The carton was of the size and shape used in that area for storage of half-gallon fruit jars of non-taxpaid whiskey (R. II, 18–19, 24–25). A few minutes later the officers heard what sounded like an automobile trunk lid and two doors being shut, and the cranking of a motor (R. II, 19, 29). Shortly thereafter the 1956 Dodge was driven out of petitioner's yard and headed north on Boyce Mill Road (R. II, 19–20). Officer Collins then sent a radio message to Turner that petitioner and the other man had put something in the car and were heading north on Boyce Mill Road (R. II, 20, 34, 40).

When Turner and the officers in his car first saw the 1956 Dodge, it was coming out of Baptist Road

into Highway 98, heading toward Durham. They recognized the license number (EX 4307) and the petitioner as the driver (R. II, 36–37). The officers followed the Dodge a short distance and then stopped it (R. II, 37). A search disclosed six gallons of nontaxpaid whiskey in fruit jar containers in the trunk, and one pint inside the car (R. II, 37–38, 41–42). Petitioner and the other man (codefendant Lewis) were then arrested (R. II, 38).

ARGUMENT

As the courts below held, the totality of the circumstances established probable cause to stop and search petitioner's automobile for contraband whiskey. *Carroll* v. *United States,* 267 U.S. 132; *Brinegar* v. *United States,* 338 U.S. 160; *Husty* v. *United States,* 282 U.S. 694; *Draper* v. *United States,* 358 U.S. 307; *United States* v. *Williams,* 384 F. 2d 988 (C.A. 4).

There is no substance to petitioner's contention that Turner and the others with him could not rely upon Officer Collins' knowledge as to what the informant had told him and upon Collins' radio message to Turner. Turner was with Collins when the information was received from the informant. The officers were acting, not as separate individuals, but as a unit in a common undertaking. In determining the question of probable cause, knowledge received by one officer was imputable to the others. It is irrelevant that the search and seizure were not personally conducted by the officer (Collins) with the most extensive, primary knowledge; probable cause is to be evaluated by the collective information of the police, rather than upon

information directly known only by the officer conducting the immediate search. *Smith* v. *United States,* 358 F. 2d 833, 835 (C.A.D.C.), certiorari denied, 386 U.S. 1008; *Williams* v. *United States,* 308 F. 2d 326, 327 (C.A.D.C.); *United States* v. *Pitt,* 382 F. 322, 324–325 (C.A. 4); *United States* v. *Bianco,* 189 F. 2d 716 (C.A. 3); *United States* v. *Holloway,* 391 F. 2d 267 (C.A. 6); *Howard* v. *United States,* 307 F. 2d 350 (C.A. 5); see *United States* v. *Ventresca,* 380 U.S. 102, 111.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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